U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 23 October 2006

CASE NO.: 2004-LHC-293

In the Matter of:

L.V.
Claimant,

v.

SHELL OIL COMPANY,
Employer

and

ESIS/ACE USA,
Carrier,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR
Party-in-Interest.

Appearances: Kurt A. Gronau, Esquire
For the Claimant

Gilbert A. Garcia, Esquire
For the Employer/Carrier

Before: STEPHEN L. PURCELL
Administrative Law Judge

DECISION AND ORDER ON REMAND GRANTING MODIFICATION AND AWARDING BENEFITS

This proceeding arises from a claim under the Longshore and Harbor Workers' Compensation Act ("Act" or "LHWCA"), 33 U.S.C. § 901 *et seq*. In accordance with the Act and the pertinent regulations, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs. Benefits were denied by the undersigned administrative law judge in a Decision and Order dated August 16, 2004. In a Decision and Order, dated September 15, 2005, the Benefits Review Board ("BRB" or "Board")

remanded this claim to the Office of Administrative Law Judges for further proceedings consistent with its decision. The claim was received by the Office of Administrative Law Judges on January 17, 2006. An order to file post-remand briefs was issued by me on March 1, 2006, and Claimant and Employer thereafter filed written arguments in support of their respective positions. No post-remand brief has been submitted by the Director, Office of Workers' Compensation Programs.

I. PROCEDURAL HISTORY

L.V. ("Claimant") filed a claim for benefits under the Act which resulted in a formal hearing on February 27, 1985, before Administrative Law Judge Henry B. Lasky. Judge Lasky subsequently found that Claimant sustained a work-related injury to her back on February 26, 1981 while working for Employer as a production technician on an offshore oil platform. *L.V. v. Shell Oil Co.*, 1984-LHC-2569 (ALJ March 22, 1985) ("*L.V. I*"). He held that she was entitled to temporary total disability benefits from February 27, 1981 through October 6, 1981, the date on which she began employment with the City of Ventura, California. Judge Lasky also found that Claimant's position with the City of Ventura did not fairly and accurately represent her post-injury wage-earning capacity because it was not suitable employment given her restrictions from the work injury with Employer, and he found that she suffered a 50 percent loss of wage earning capacity. He thus awarded Claimant permanent partial disability benefits of $148.67 per week. Judge Lasky further awarded future medical benefits, *see* 33 U.S.C. §907, and in addition, awarded Employer relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

In 2003, Claimant sought to modify Judge Lasky's 1985 award of permanent partial disability benefits to permanent total disability benefits, based on an alleged mistake of fact and/or a change of condition. *See* 33 U.S.C. § 922. Claimant also sought reimbursement of past medical expenses, as well as continuing medical care. A formal hearing was held before me on February 24, 2004. In a Decision and Order dated August 16, 2004, I denied Claimant's modification request, rejecting her contention that Judge Lasky made a mistake in fact regarding her post-injury loss of wage-earning capacity.[1] I also found that Claimant did not meet her burden of establishing a change in either her physical or economic condition. Moreover, Claimant's request for medical benefits was denied. In this regard, I found that Claimant failed to meet her burden of establishing that the medical treatment she received was for the 1981 injury, or that the costs of such treatment were incurred after authorization was requested and withheld by employer.

Claimant subsequently appealed my Decision and Order to the BRB. In response to Claimant's appeal, the Board vacated my denial of benefits and remanded the case for further consideration on two grounds. First, the BRB remanded for consideration of the extent of Claimant's disability as of 1984, and, concomitantly, a finding as to whether Claimant met her burden of proof to show that Judge Lasky's ongoing permanent partial disability award was based on a mistake of fact. *L.V. v. Shell Oil Co.*, BRB No. 04-0938, slip. op. at 5 (Sept. 15,

[1] *L.V. v. Shell Oil Co*, 2004-LHC-293 (ALJ Aug. 16, 2004) ("*L.V. II*").

2005)(unpub.) ("*L.V. Remand*").[2] Second, the BRB remanded my denial of medical care after 2003, finding that I did not apply the Section 20(a) presumption to the issue of the work-relatedness of Claimant's current condition. *Id.* at 8.

II. ISSUES

1. Has Claimant established either a mistake in fact or a change of condition which would warrant modification of the March 22, 1985 decision awarding benefits under Section 22 of the Act?

2. Is Claimant entitled to continuing medical care under Section 7 of the Act?

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW[3]

Mistake of Fact or Change in Condition

Section 22 of the Act, 33 U.S.C. § 922, provides the only means for changing otherwise final decisions. Modification pursuant to this section is permitted based upon either a mistake of fact in the initial decision or a change in the Claimant's physical or economic condition. See *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1 (CRT) (1995). It is well established that the party requesting modification bears the burden of proof. *See, e.g.*, *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54 (CRT) (1997); *Kinlaw v. Stevens Shipping & Terminal Co.*, 33 BRBS 69 (1999), *aff'd mem.*, 238 F.3d 414 (4th Cir. 2000) (table).

Under Section 22, the administrative law judge has broad discretion to correct mistakes of fact "whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971), *reh'g denied*, 404 U.S. 1053 (1972); *see Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, *reh'g denied*, 391 U.S. 929 (1968); *Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 36 BRBS 35 (CRT) (7th Cir. 2002). The Supreme Court's decisions in *O'Keeffe* and *Banks* make clear that the scope of modification based on a mistake in fact is not limited to any particular kind of factual errors; any mistake in fact, including the ultimate fact of entitlement to benefits, may be corrected on modification. *See Rambo I*, 515 U.S. at 295-296, 30 BRBS at 2-3(CRT); *Old Ben Coal Co.*, 292 F.3d at 541, 545, 36 BRBS at 40, 43-44. The decision to reopen a case due to a mistake in fact must render justice under the Act. *See O'Keeffe*, 404 U.S. at 256; *Banks*, 390 U.S. at 464; *Old Ben Coal Co.*, 292 F.3d at 546-547, 36 BRBS at 44-45.

---

[2] The BRB noted that Employer is not liable for any increase in Claimant's disability due to the 1984 injury with Ventura. *See generally Leach v. Thompson's Dairy,* 13 BRBS 231 (1981). *Id.* Subsequent to Claimant's employment with Employer, on February 18, 1984, Claimant suffered a work accident where she "felt a pop" in her back. *L.V. Remand* at 2. Claimant contended that she had not been gainfully employed since that incident. *Id.*

[3] Review of the previous decision and order establishes that the findings of fact include a complete and accurate description of relevant evidence. L.V. II. No fault has been found with the description of relevant evidence. Therefore, the findings of fact from that decision and order are incorporated herein by reference.

Modification based on a change in condition may be granted where the claimant's physical condition has improved or deteriorated following entry of the award but before the request for modification. *See Rizzi v. Four Boro Contracting Corp.*, 1 BRBS 130 (1974). Where a party seeks modification on this basis, an initial determination must be made as to whether that party has met his or her threshold requirement by offering evidence demonstrating that there has been a change in the claimant's condition. *Jensen v. Weeks Marine, Inc. (Jensen II)*, 34 BRBS 147 (2000), *decision and order on remand at* 35 BRBS 174 (BRB No. 01-0532) (Nov. 30, 2001). This initial inquiry is limited to a consideration of whether the newly submitted evidence is sufficient to bring the claim within the scope of Section 22. If so, the administrative law judge must determine whether modification is proper by considering all the relevant evidence in the record to determine whether there has in fact been a change in the claimant's physical or economic condition.

In its September 15, 2005 remand order, the Board expressly affirmed my findings that Claimant failed to establish any change in either her physical or economic condition since the time of Judge Lasky's decision. *L.V. Remand* at 6, 7 n. 10. However, the Board vacated my finding that Claimant failed to establish a mistake in fact which would entitle her to modification of Judge Lasky's decision pursuant to Section 22 of the Act, and it remanded the claim for further findings consistent with its decision. *Id.* at 8.

a. Mistake of Fact Regarding Extent of Disability

Claimant argued on appeal that Judge Lasky made a mistake in fact when "he found her job with Ventura to be unsuitable, yet used one-half of the wages of this job as the basis for her ongoing permanent partial disability award after she left that employment." *L.V. Remand* at 4. Claimant further argued that I failed to discuss this contention in my decision denying modification, and the Board agreed, stating:

> We agree with claimant that the administrative law judge did not adequately address her contention and therefore we must remand the case for reconsideration. Judge Lasky implicitly found that claimant could not return to her usual work. Employer thus bore the burden of establishing suitable alternate employment. Claimant obtained a job on her own which Judge Lasky found was "totally unsuited" to claimant's capabilities because of her physical condition due to the work injury. His award of permanent partial disability benefits while she worked in the unsuitable position therefore was appropriate for as long as she was employed by Ventura.
>
> However, in her modification petition, claimant alleged that the ongoing permanent partial disability award was based on a mistake in fact since she was unable to retain the unsuitable job or to obtain other employment due to her work injury. Claimant therefore maintained that she was entitled to a greater award. This mistake of fact issue should have been addressed by the administrative law judge.

Ibid. (citations omitted).

As a preliminary matter, I note that Claimant's assertion that Judge Lasky used one-half of the wages of her City of Ventura job as the basis for her ongoing permanent partial disability benefits award was raised, and expressly rejected, in my decision and order denying benefits. I wrote, in relevant part:

> According to Claimant, Judge Lasky "inexplicably . . . fixed Claimant's loss of wage earning capacity *in proportion to the earnings that she had with the City of Ventura.*" Cl. Br. at 5 (italics added). I find Claimant's characterization of Judge Lasky's decision inaccurate and her claim in this regard to be without merit.
>
> In a case involving an injury causing partial disability to a body part not listed under Section 8(c)(1) through (20), Section 8(h) of the LHWCA provides that the wage-earning capacity of a claimant "shall be determined by [the claimant's] actual earnings if such actual earnings fairly and reasonably represent [his or her] wage-earning capacity[.]" 33 U.S.C. § 908(h). If actual post-injury earnings do not accurately reflect the residual earning capacity of the worker, the administrative law judge must look elsewhere in the record for evidence upon which to base his determination. *See id*.
>
> According to the relevant portion of Judge Lasky's decision and order:
>
> > I am required to either accept the Claimant's post-injury earnings as her wage earning capacity or establish a new specific dollar figure as Claimant's post-injury wage earning capacity. The wage earning capacity is determined from actual wages, unless they do not fairly and reasonably represent wage earning capacity, in which case, capacity is determined by considering the nature of the injury, the degree of physical impairment, the employee's usual employment and other factors which may affect earning capacities in the future. In the case at bar, Claimant went to work for the City of Ventura at reduced wages from what she had earned while employed with the Employer herein, but in a job which was as physically demanding as her position with this Employer and inappropriate for her to perform. Although she worked for a sustained period her ultimate inability to continue with such work as a result of an aggravating injury while with the City of Ventura was inevitable. Although Claimant commenced work for the City of Ventura at the rate of $5.76 per hour, she ultimately was earning $9.19 per hour from October, 1983 until she stopped working in 1984. *I do not consider the wages actually earned by the Claimant after October 6, 1981 [with the City of Ventura] as reflective of her actual loss of wage earning capacity.* I conclude that Claimant suffered a fifty percent loss of wage earning capacity, notwithstanding the fact that she sought employment from which she ultimately realized $9.19 per hour. I find that Claimant has suffered a fifty percent impairment of her wage earning capacity and therefore her current wage earning capacity is fifty percent of $446.00 per week which was her average weekly wage at the time of the injury which is the subject of this

> case or $223.00 per week. Her loss of wage earning capacity is therefore $223.00 per week . . . .
>
> CX 1 at 115-16 (citations omitted) (italics added). *Thus, contrary to Claimant's assertion, Judge Lasky clearly believed that her actual wages while employed with the City of Ventura did not fairly represent her residual earning capacity after her February 26, 1981 work-related accident*.

L.V. II at 14-15 (emphasis added).

Based on the foregoing, I find that Claimant's contention in this regard, raised in her original request for modification and again on appeal, is incorrect and does not establish a mistake in fact in Judge Lasky's decision awarding benefits. However, as the Board alluded to in its decision, this finding does not end the inquiry as to whether Judge Lasky's decision was predicated on some *other* mistake in fact.

(1) *Employer's Burden to Show Suitable Alternative Employment.*

As the Board correctly noted, once Judge Lasky implicitly determined Claimant could not return to her usual work with Shell after the 1981 injury, Employer bore the burden of establishing the availability of suitable alternative employment. *L.V. Remand* at 4. Since Employer presented no evidence whatsoever at the original hearing showing the availability of suitable alternative employment after 1981,[4] Judge Lasky should have found that Claimant was totally disabled from the time of her injury with Shell, that she was partially disabled during the period of her employment with the City of Ventura, and that she was totally disabled thereafter until the time of his decision.[5] His ongoing award of permanent partial disability compensation beginning October 6, 1981 was thus based on a mistake of fact, and Claimant's request for modification on this basis must therefore be granted.

Section 22 of the Act provides, in relevant part, that once a change in condition or mistake in fact is shown, the administrative law judge

> may . . . issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. Such new order shall not affect any compensation previously paid, except that an award increasing the compensation rate may be made effective from the date of the injury, and if any part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be made effective from the date of

[4] If a claimant establishes a *prima facie* case of disability, the burden shifts to the employer to demonstrate the availability of suitable alternative employment within the geographic area where the claimant resides. *See, e.g., See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994); *Bumble Bee Seafoods v. Dir., OWCP*, 629 F.2d 1327, 1329-30 (9th Cir. 1980).

[5] With respect to whether Claimant was partially, versus totally, disabled following her employment with Shell, the Board expressly found that Judge Lasky's award of a permanent partial disability benefits during the period of her employment with the City of Ventura was appropriate for as long as she was employed there. *L.V. Remand* at 4. My findings regarding the level of her partial disability during this period (October 6, 1981 through February 18, 1984) are discussed *infra* under the heading "Claimant's Post-Injury Wage-Earning Capacity."

> the injury, and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such method as may be determined by the [administrative law judge] with the approval of the Secretary. . . .

33 U.S.C. § 922. Since there was no evidence of suitable alternative employment in the record as of the date of Judge Lasky's March 22, 1985 decision, Claimant is entitled to an award of total disability compensation both before and after her employment with the City of Ventura until such time as Employer establishes the availability of suitable alternative employment which Claimant could perform considering her limitations, age, education, and background.

Claimant is a high school graduate with some college credits, was raised in a small rural community in northern Michigan, worked there for Shell in an unspecified job before being transferred to California, and worked there as a production technician for Shell doing very heavy physical labor. *L.V. I* at 2. After leaving Shell, Claimant worked for the City of Ventura as a maintenance worker, again performing heavy labor. *Id.* at 3. She was born on September 25, 1949, and she was 35 years old when she left that employment. *L.V. I* at 2. With respect to her physical limitations after her 1981 injury at Shell and subsequent to Judge Lasky's decision, the medical evidence produced by the parties, and described below, establishes that Claimant was capable of performing light-duty work with no repetitive bending or stooping.

In a report dated November 24, 1981, shortly after Claimant began working for the City of Ventura, Dr. Alan Roberts noted that Claimant experienced back pain from lifting as little as 10 pounds, sitting for 15 minutes, standing for 20 minutes, walking three blocks, and engaging in physical activity. CX 15 at 236-37. The pain radiated into her right and left hips, right and left buttocks, and left lower extremity down to the toes of the left foot. *Id.* Dr. Roberts concluded that Claimant's condition at that time was industrially related to accidents which occurred while working for Shell in November, 1979 and February, 1981. *Id.* at 246. He further opined that her condition was "permanent and stationary," that her condition precluded heavy lifting, and that she should be provided further orthopedic care and treatment to include pain medication, muscle relaxants, and physical therapy. *Id.*

Approximately one and one-half years later, Dr. Trygve I. Forland, in an April 12, 1983 medical report, had no opinion as to the extent of Claimant's disability, although he stated that "the 1981 incident appears to have strained the lumbo-sacral spine and caused nerve root irritation. It sounds as if the greatest part of the leg discomfort is due to the 1981 injury, whereas, the original cause of the strain of the low back is probably related to the 1979 injury." EX 6 at 54-55.

Dr. Clyde Arnold examined Claimant on July 6, 1983 and found that she was essentially normal with only mild tenderness of the lumbosacral and sacroiliac regions. EX 6 at 50-51. He diagnosed Claimant with chronic coccygodynia and opined that her symptoms were "reasonably secondary to injuries described." *Id.* at 51-52. Dr. Arnold further stated that he did not believe any additional supervised medical treatment or follow-up care was necessary and that Claimant had reached "a permanent and stationary status with an associated disability precluding her from

prolonged sitting activities." *Id.* at 52. His conclusions also indicate that employment with light lifting would constitute suitable alternative employment. *Ibid*.

On February 17, 1984, while employed with the City of Ventura, Claimant sustained an injury to her back while breaking asphalt with a pick-ax. EX 6 at 58. A "Doctor's First Report of Work Injury" completed by Dr. Jon D. Overholt on February 20, 1984[6] and filed with the City of Ventura states, in relevant part:

> Previous back injury 1970. Three months ago while shoveling heavy dirt, re-aggravation with low discomfort. Friday, swung pick, acute pain in the low back radiating down both leg[s]. Known discogenic disease at two levels. Previous orthopedic care from Dr. Forland in Santa Paula. EXAM: Focal low back pain at the S1-2 level with trigger points. Peripheral motor and sensory exam unremarkable.

Ibid.

On April 2, 1984, Claimant underwent back surgery involving a microscopic lumbar discectomy on the left side at L5-S1. EX 6 at 33. Dr. Daniel Murphy performed the surgery and the report of the procedure notes that "a modestly bulging disc rupture was found at L5-S1 with no extruded fragments." *Ibid*. According to an April 10, 1984 letter from Dr. Murphy, Claimant was capable of light duty work with no heavy lifting, repeated bending, or stooping. EX 6 at 40. In another letter of the same date, Dr. Murphy notes that Claimant "tried to return to her job [with the City of Ventura] doing fairly heavy physical work and rapidly had a recurrence of her pain." *Id.* at 41. He concluded that she could not do heavy work involving lifting or repeated bending and stooping. *Ibid.* Dr. Murphy also opined that Claimant's February 17, 1984 injury "may have made a significant worsening of her disc condition." *Id.* at 47-48. In a letter dated June 10, 1985, Dr. Murphy noted that Claimant was seen that date for follow-up evaluation. *Id.* at 30. He wrote:

> She still has some aching pains but they are much improved by taking Motrin. She is now just over two months postop microscopic surgery on the left at L5-S1. She has been offered a job as a computer programmer trainee, evidently beginning August 1, 1985. This would seem appropriate for her and I am releasing her to return to work as of August 1, 1985. She will be moving out of the area and I do not feel that any neurosurgical follow-up will be necessary. . . .
>
> I feel she could now be placed at a permanent and stationary level precluding heavy work or a 30% level of disability.

Ibid.

[6] Although the date of the report is erroneously noted at the bottom of the report as "2/20/83," the date of injury and date of examination are correctly reported in the body of the report as "2/17/84" and "2/20/84," respectively. EX 6 at 58, Items Nos. 7 and 9.

As previously noted, the question of extent of disability is an economic as well as medical concept. *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Eastern S.S. Lines v. Monahan*, 110 F.2d 840 (1st Cir. 1940). The claimant bears the initial burden of showing that a work-related injury prevents her from performing her former job. *Kalama Services, Inc. v. Director, Office of Workers' Compensation Programs*, 354 F.3d 1085, 1090 (9th Cir. 2004) *citing Edwards v. Director, Office of Workers Compensation Programs*, 999 F.2d 1374, 1375 (9th Cir. 2004). A claimant who shows she is unable to return to her former employment due to her work-related injury establishes a *prima facie* case of disability. The burden then shifts to the employer to show the existence of suitable alternative employment. *P & M Crane Co. v. Hayes*, 930 F.2d 424, 420, 24 BRBS 116 (5th Cir. 1991); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038, 14 BRBS 1566 (5th Cir. 1981). Furthermore, a claimant who establishes an inability to return to her usual employment is entitled to an award of total disability compensation until the date on which the employer demonstrates the availability of suitable alternative employment. *Rinaldi v. Gen. Dynamics Corp.*, 25 BRBS 128 (1991). If the employer demonstrates the availability of realistic job opportunities, the employee's disability is partial, not total. *Southern v. Farmer's Export Co.*, 17 BRBS 24 (1985). Issues relating to nature and extent do not benefit from the Section 20(a) presumption. The burden is upon Claimant to demonstrate continuing disability, whether temporary or permanent, as a result of her accident.

It is not disputed that Claimant was disabled as a result of her 1981 back injury and could not return to her former employment. *L.V. Remand* at 3, 4. Furthermore, there is no question that Employer failed to meet its burden to establish the availability of suitable alternative employment at the time of Judge Lasky's March 22, 1985 decision. It is also clear, however, that Employer has now submitted evidence that Claimant had available to her suitable alternative employment after the date of Judge Lasky's decision.

In its remand order, the Board wrote with respect to assessing the extent of Claimant's disability after her 1984 injury with the City of Ventura:

> Evidence regarding jobs claimant held in the intervening years may be relevant to claimant's wage-earning capacity. The record also contains a statement by Dr. Murphy that claimant was to start a suitable job as a computer programmer trainee in August 1985. If employer established the availability of suitable work or claimant obtained suitable, steady work on her own and left these positions for reasons other than her 1981 work injury or voluntarily removed herself from the workforce, employer does not bear a renewed burden of establishing new suitable alternate employment thereafter.

L.V. Remand at 5.

The first evidence of suitable alternative employment available to Claimant after her 1984 injury shown by the current record is, as the Board notes, a job which Claimant was offered as a computer programmer trainee beginning August 1, 1985. EX 6 at 30. Dr. Murphy, who performed Claimant's back surgery and treated her thereafter, clearly found this work to be within Claimant's physical restrictions, and he released her to return to work on August 1, 1985. *Ibid*. The Board has previously held that a single job offer is sufficient to establish suitable

alternative employment if the Claimant is physically capable of performing the job. *Shiver v. United States Marine Corp., Marine Base Exch.*, 23 BRBS 246, 252 (1990). There is no question that Claimant was physically capable of performing the computer programmer trainee position, inasmuch as her treating physician determined that such work was within her medical restrictions, and I thus find that Employer has met its burden to show there was suitable alternative work as of August 1, 1985.

Once an employer meets its burden to establish suitable alternative employment, the burden then shifts back to the claimant to show that he or she made a genuine effort to find employment. *See, e.g., Palombo v. Director, OWCP*, 937 F.2d 70, 73 (2d Cir. 1991), 25 BRBS 1, 6(CRT). I find, for the reasons cited below, that Claimant has not met her burden to show that she made a genuine effort to find employment after her departure from the City of Ventura.

First, Claimant has provided no explanation regarding why she did not commence work on August 1, 1985 in the position she had been offered as a computer programmer trainee. She simply testified that she left her job with the City of Ventura because there was no "light duty" available to her there, and she had no income in 1985 or 1986. Tr. 25, 26-27.

Claimant also testified that she subsequently worked in a variety of jobs after leaving the City of Ventura, and she has failed to present any credible evidence that she was incapable of performing these jobs because of her 1981 injury with Shell. For example, Claimant testified that from May through June 1987 she groomed dogs and cats for Apricot Afghan Grooming and earned $550. Tr. 28. She next worked at The Animal Lover performing the same duties where she earned $5,012.00 from March to August 1988. Tr. 28; CX 6. She and her boyfriend then started a pet grooming business the following year which generated revenues of $17,739 in 1989, $32,997 in 1990, $55,858 in 1991, $112,170 in 1992, and $101,788 in 1993. Tr. 29-30; CX 7-11. Despite the substantial increase in its gross revenue over the years, Claimant alleged that her pet grooming business never made a profit. *Ibid*. However, no evidence whatsoever was presented by Claimant regarding her personal income from the business or expenses associated with the business which might reasonably be deducted from gross revenues, such as the number of employees who worked for the business, the wages of those employees, the cost of equipment purchased for use by the business, the cost of goods sold by the business, or the monthly rent or utilities paid for by the business.

Claimant moved from California to Arizona in 1994 and thereafter worked for two different employers. She worked first at Bark-N-Babies from July to September 21, 1994 where she again groomed pets and earned wages of $2,092.50, and she was then employed by Eagle Distributors, Inc. where she worked in shipping and receiving and earned $600 in December, 1994. Tr. 32; CX 12. Claimant testified that she left Bark-N-Babies because she "couldn't do the big dogs" and her employer "decided that she would get somebody else." Tr. 32. She continued her work with Eagle Distributors, Inc. from January 1 through April 23, 1995, earning $5,404.64, and she quit because "they expanded and they picked up a couple new warehouses right close by, and they just added more and more onto me, so I would wind up on my feet too much on the hardwood floors." Tr. 33. According to Claimant, walking made her back hurt and her feet go numb, and her varicose veins made it impossible for her to stand on hardwood and cement floors all day. *Ibid*. Claimant next found a job working for Jerry's Donuts, L.L.C.

decorating donuts and waiting on customers. Tr. 33-34. She testified that she worked there from May 1 through December 31, 1995, earning $7,959.78, and left after the owner sold the business. Tr. 34; CX 13.

From 1996 until she relocated from Arizona to Michigan in 2003, according to Claimant, she looked for jobs in "retail" and "pet grooming" but, whenever she was hired, she only worked a day or two before being let go because the work was "too difficult." Tr. 34-35. Claimant further testified that she traveled with her boyfriend during this time when he was in the United States, and, when he was sent overseas, she would help friends who owned "a bakery and deli." Tr. 35. She also testified that she "caretaked" a house from 2000 to 2002 for which she received free room and board and money for her car payments. Tr. 36, 71.

After she returned to Michigan in 2003, Claimant worked for Kelly Services, Inc. and earned $2,521 from October through December of that year. Tr. 46; CX 20. Kelly Services would send her to various employers where she performed temporary "light industry" work. Tr. 46. The first job she had was at North Point Plastics and involved folding directions into a paint-by-number box on a production line during which time she could sit or stand. Tr. 46-48. Claimant testified that she knew just about everyone who worked at the plant and stated "[t]hey would give me easy jobs [when they saw me struggling]." Tr. 48. She further testified that she was "in constant pain with [her] neck" and had trouble "concentrating with the pain medication." Tr. 48-49. According to Claimant, she was laid off at that plant in November and Kelly then sent her to work for Great Lakes Trim, which made car seats for Sports Utility Vehicles, where she worked gluing carpeting and attaching a leather handle to a fiberglass frame. Tr. 50-51. The work was sporadic and she was laid off after about three weeks, returned for about a week, was laid off again, and then returned working part-time from 18 to 36 hours a week. Tr. 51. She again testified that she knew the people who worked at the plant and they continued to "cover" for her. *Ibid*.

The foregoing evidence establishes that Claimant had suitable alternative employment available to her as of August 1, 1985, shortly after she left her employment with the City of Ventura. The evidence further shows that she worked at a variety of jobs thereafter, none of which she has shown to be beyond her capacity for performing light duty work with no heavy lifting, repeated bending, or stooping. While Claimant has alleged that she was unable to adequately perform some of these jobs because of physical limitations, her testimony is the only evidence supporting her claims in this regard. For all the reasons stated in my prior decision, I find her testimony is not credible.[7] Given the fact that Employer has established the availability of suitable alternative employment as of August 1, 1985, I further find her disability from that date forward is partial, not total. *Southern v. Farmer's Export Co.*, *supra*, 17 BRBS 24.

(2) *Claimant's Post-Injury Wage-Earning Capacity*.

Employer argues that Claimant's Forms LS-200, coupled with her testimony at the hearing on February 24, 2004, establish that Claimant had substantial gross earnings subsequent

[7] The Board sustained my finding that the medical evidence of record did not establish a change in Claimant's physical condition based, in part, on its determination that I "rationally found that claimant is not a credible witness and thus rejected her assertion that her pain is disabling." *L.V. II* at 6.

to her February 26, 1981 injury such that she is not totally disabled. Employer's Post-Trial Brief at 4-5. According to Employer, Claimant did not sustain *any* loss of wage-earning capacity after leaving Shell. *Ibid*. While I agree with Employer that Claimant has not been totally disabled since the time of her 1981 injury with Shell, a review of the record in the instant case confirms that she did sustain some loss of wage-earning capacity following that injury which rendered her permanently partially disabled.

Section 8(c)(21) of the Act, 33 U.S.C. § 808(c)(21), provides the formula for determining unscheduled permanent partial disability such as Claimant's low back condition in this case. Compensation for such disability is computed as 66 2/3 percent of the difference between a claimant's average weekly wage at the time of the injury and his or her wage-earning capacity thereafter "in the same employment or otherwise . . . ." *Ibid*. The computation is an economic measurement, based on a medical foundation. *Owens v. Traynor*, 274 F. Supp. 770 (D.Md. 1966), *aff'd*, 396 F.2d 783 (4th Cir. 1968), *cert. denied*, 393 U.S. 962 (1968). Consideration must be given to the claimant's age, education, industrial history, and the availability of employment he or she can perform after the injury. *White v. Bath Iron Works Corp.*, 7 BRBS 86, 91-92 , BRB Nos. 76-330, 76-330A (December 14, 1977), *aff'd*, 584 F.2d 569, 8 BRBS 818 (1st Cir. 1978). The purely physical extent of disability is an important factor in determining unscheduled permanent partial disabilities, but "earning capacity is the ultimate fact to be determined." *Twin Harbor Stevedoring & Tug Co. v. Marshall*, 103 F.2d 513, 515 (9th Cir. 1939). According to Section 8(h) of the LHWCA:

> The wage-earning capacity of an injured employee in cases of partial disability under subdivision (c)(21) of this section . . . shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity:
>
> Provided, *however*, That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

33 U.S.C. § 908(h).

As noted above, the Board has rejected Claimant's assertion that she was totally disabled during the period she was employed by the City of Ventura despite the fact that Judge Lasky found that employment to be totally unsuitable for her. *L.V. Remand* at 4 ("[Judge Lasky's] award of permanent partial disability benefits while [Claimant] worked in the unsuitable position . . . was appropriate for as long as she was employed by Ventura."). It is not clear, however, whether the Board determined that Judge Lasky's finding of the *level* of the permanent partial disability (50 percent) was appropriate, or whether it simply found the award of *some* level of partial disability was appropriate. Following is a review Judge Lasky's conclusions followed by my findings based on the factors set forth in Section 8(h) of the Act and relevant authorities.

In his 1985 decision awarding benefits, Judge Lasky concluded that Claimant was then totally disabled, but that "it is not possible to determine with any degree of certainty how much of her current disability is the result of the daily trauma which her body sustained as a result of her working as a laborer for the City of Ventura from October 6, 1981 through February 18, 1984." *L.V. I* at 7. He further determined that she went to work for the City of Ventura after leaving Shell, earning reduced wages in her subsequent employment, and he did "not consider the wages actually earned by the Claimant after October 6, 1981 as reflective of her actual loss of wage earning capacity." *Id.* at 7-8. Judge Lasky thus determined that Claimant suffered a fifty percent loss of wage-earning capacity. *Id.* at 8. He further concluded that "at least fifty percent of her current disability must be attributed to her injury in 1984 which was with the City of Ventura." *Id.* at 8, n.1. Based on his findings that: (1) Claimant had a wage-earning capacity of $446 when she was injured in 1981 while working with Shell (her average weekly wage at that time); (2) Claimant sustained a fifty percent loss of wage-earning capacity as a result of her injury with Shell; (3) Claimant was totally disabled as a result of her injuries with Shell *and* the City of Ventura; and (4) one-half of her total disability was a result of her injury in 1984 in Ventura, Judge Lasky calculated Claimant's compensation rate for her partial disability as $223, *i.e.*, 50 percent of her pre-injury wages while working with Shell.

As noted above, this was error with respect to the period after February 18, 1984 when Claimant left her job in Ventura inasmuch as Employer had not, at the time of Judge Lasky's decision, introduced any evidence that suitable alternative employment was available to Claimant. I also believe, as explained below, that Judge Lasky erred in assessing Claimant's post-1981 wage-earning capacity at 50 percent of what she had earned while working for Shell.

The available medical evidence in this case dated shortly after she began working in Ventura reveals that Claimant experienced back pain from lifting as little as 10 pounds, sitting for 15 minutes, standing for 20 minutes, walking three blocks, and engaging in physical activity.[8] CX 15 at 236-37. Despite this assessment, Claimant thereafter worked in Ventura as a maintenance worker for more than two years until she again injured her back on February 17, 1984. After undergoing back surgery following this injury, she was unable to do work involving heavy lifting or repeated bending and stooping but was clearly capable of engaging in light duty work. EX 6 at 41. Dr. Murphy fixed the level of her back disability at 30%, determined that such disability was "permanent and stationary," and released her to return to work as of August 1, 1985. EX 6 at 30. Claimant was then 35 years of age, was a high-school graduate with some college credits, and had work experience as a production technician and maintenance worker. Claimant thereafter engaged in a variety of income-producing activities including, *inter alia*, working as a pet groomer, decorating donuts and waiting on customers, working for friends in a bakery and deli, and starting her own business. She also took care of "estates" over a two-year period for which she received such compensation as free room and board and money for her car payments.

Given Claimant's age, education, work experience, and physical limitations, I find pursuant to Section 8(h) of the Act that Claimant's wage-earning capacity following her 1981

[8] I note that, while a claimant's wage-earning capacity is ultimately an "economic measurement" resulting in a "precise dollar amount," the level of wage-earning capacity clearly must be "based on a medical foundation." *Owens v. Traynor*, *supra*., 274 F. Supp. 770.

injury was 70% of her pre-injury average weekly wage while working for Shell, *i.e.*, $312.20.[9] As noted above, the Board has sustained my determination that the evidence presented by the parties did not reveal any change either in Claimant's physical or economic condition after her 1984 injury in Ventura. *L.V. Remand* at 5, 7 n.10. Therefore, based on the foregoing, and pursuant to Section 8(c)(21) of the Act, I find that Claimant is entitled to an award of compensation at the rate of $89.20 per week from August 1, 1985 to the present and continuing.[10]

b. Entitlement to Medical Expenses

In its remand decision, the Board also vacated my denial of future medical care, finding that I did not apply the Section 20(a) presumption to the issue of the work-relatedness of Claimant's current condition. *L.V. Remand* at 8. The Board wrote, in relevant part:

> With regard to reimbursement for medical expenses incurred beginning in 1999, the administrative law judge rationally rejected claimant's testimony that she contacted employer, an alleged carrier, and the Department of Labor prior to 2003 to request authorization for medical care from new physicians and/or chiropractors. The administrative law judge also found that there is no indication that the chiropractic care was for a spinal subluxation. As it is rational and supported by substantial evidence, we affirm the administrative law judge's denial of reimbursement for medical expenses incurred prior to 2003.
>
> . . . . .
>
> We cannot affirm the administrative law judge's denial of future medical care, as the administrative law judge did not apply the Section 20(a) presumption to the issue of the work-relatedness of claimant's current condition. Claimant need not affirmatively establish that her condition is related to the 1981 injury in order to be entitled to the Section 20(a) presumption. Moreover, if claimant's condition is the result of the natural progression of her 1981 injury, employer remains liable for necessary medical treatment. If the Section 20(a) presumption is invoked, it is employer's burden on rebuttal to establish that claimant's condition is the result of an intervening cause which is not the natural or unavoidable result of the work injury. . . .

L.V. Remand at 7-8 (citations omitted).

According to Section 20(a) of the LHWCA, "[i]n any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary . . . [t]hat the claim comes within the provisions of this Act." 33 U.S.C. § 920(a). Employer has conceded that Claimant sustained an injury in 1981 while

[9] Claimant's average weekly wage at Shell was, as previously stated, $446.00. Seventy percent of this wage is $312.20.

[10] Claimant's average weekly wage of $446.00 less her retained wage-earning capacity of $312.20 equals $133.80 multiplied by 66 2/3% = $89.20.

working for Employer. *See* Employer's Post-Hearing Brief (April 27, 2004) at 7 ("[T]he record is clear that the claimant sustained an industrial injury on February 26, 1981."); Employer's Post Remand Brief (March 30, 2006) at 1 ("[O]n February 26, 1981, [Claimant] sustained [a] work-related injury to her back while working on an off-shore platform."). Based on Section 20(a) of the Act, and the Board's remand in this case, it is presumed that any medical care Claimant received for her back disability after 2003 when she sought authorization for treatment is related to her 1981 injury while working for Shell, and it is thus Employer's burden to rebut that presumption.

The medical evidence of record shows that various medical providers who treated or evaluated Claimant from 2003 forward could not determine whether the symptoms complained of by her were attributable to Claimant's injury in 1981. *See, e.g.*, EX 4 (statement of Dr. Parke that he could not "objectively and conclusively determine that [Claimant's] ongoing back problems are causally related to a work injury sustained over twenty years ago."); EX 5 (statement by Dr. Fern that he could not determine whether Claimant's present disability was related to her prior work injury); EX 3 (statement by Dr. Mandell, Employer's expert, that he was unable to relate Claimant's then-current symptoms to her 1981 injury and that her "presentation today is the result of attrition over the years, the wear of the spinal elements and the number of occasions that apparently she has had injury to her back and to delineate a specific event of 1981 is unlikely."). I therefore find that Employer has failed to meet its burden to present substantial evidence overcoming the presumption that treatment received by Claimant during and after 2003 for her back disability was due to her work-related injury in 1981.[11]

Section 7 of the Act provides that employers "shall furnish such medical, surgical, and other attendance or treatment . . . for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. 907(a). However, a claimant is not entitled to recover payments for medical services or supplies obtained unless the employer has either refused or neglected a request to furnish such services. 20 C.F.R. § 702.421. Furthermore, in order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. *Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). It is the claimant's burden to establish the necessity of treatment rendered for his or her work-related injury. *See generally Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996); *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988). An employer is not liable for medical expenses due to the degenerative processes of aging. *Haynes v. Rederi A/S Aladdin*, 362 F.2d 345 (5th Cir. 1966), *cert denied*, 385 U.S. 1020 (1967). In addition, although applicable regulations were changed in 1977 to allow for payments to chiropractors, chiropractic treatment is reimbursable only to the extent it consists of manual manipulation of the spine to correct a subluxation shown by x-ray or clinical findings. *See Blanchard v. General Dynamics Corp.*, 10 BRBS 69, 71 (1979); 20 C.F.R. § 702.404.

[11] To rebut the Section 20(a) presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between the treatment and the claimant's work-related injury. *See Parsons Corp. of California v. Director, OWCP*, 619 F.2d 38 (9th Cir. 1980); *Butler v. District Parking Management Co.*, 363 F.2d 682 (D.C. Cir. 1966); *Ranks v. Bath Iron Works Corp.*, 22 BRBS 301, 305 (1989). "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion. *Noble Drilling v. Drake*, 795 F.2d 478 (5th Cir. 1986); *E & L Transport Co. v. N.L.R.B*, 85 F.3d 1258 (7th Cir. 1996).

At the time of the formal hearing in 2004, Claimant submitted, in support of her request for reimbursement of medical expenses, a handwritten list of charges associated with chiropractic services rendered between 1999 and 2003. CX 20. As noted above, Claimant has not established that such treatment was to correct a subluxation of the spine shown by x-ray or clinical findings, and the Board thus sustained my denial of these costs.

Claimant has also submitted copies of several receipts totaling $793.19 which she alleges relate to treatment or medication obtained for her back disability. CX 21. Although Employer asserts that it is not liable for any medical costs incurred by Claimant because it produced substantial evidence rebutting the Section 20(a) presumption, *see* Emp. Post-Remand Br. at 7, Employer has not challenged the reasonableness or necessity of the costs identified by Claimant in CX 21. I find that these expenses are attributable to Claimant's work-related back condition and thus further find that Employer must reimburse Claimant in the amount of $793.19 for her out-of-pocket expenses.

In *Ion v. Duluth, Missabe and Iron Range Railway Co*., 31 BRBS 75 (1997), the Board held that interest should be awarded on all past due medical benefits, whether the costs were initially borne by the claimant or by medical providers. Employer is thus liable for interest on the aforementioned medical costs from the date they were incurred until they are reimbursed at the rate provided by 28 U.S.C. § 1961 (1982).

IV. ATTORNEY FEES

No award of attorney's fees for services to Claimant is made herein since no application for fees has been made by Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorney's fees.[12] A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

[12] Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. *Revoir v. General Dynamics Corp.*, 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges ("OALJ") provides the clearest indication of the date when informal proceedings terminate. *Miller v. Prolerized New England Co.*, 14 BRBS 811, 813 (1981), *aff'd*, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered in this case after October 31, 2003, the date the matter was referred to OALJ by the District Director. Counsel should also note that I am not authorized to rule on his entitlement to attorney fees and expenses incurred when this matter was not pending in OALJ. Counsel thus should exclude from his fee petition any fees and expenses incurred when the case was either before the Benefits Review Board or the District Director.

ORDER

Based on the foregoing, IT IS HEREBY ORDERED that:

1. Employer shall pay Claimant compensation for temporary total disability for the periods February 27, 1981 to October 1981 and February 18, 1984 to August 1, 1985 based on a compensation rate of $297.33 per week subject to credit for compensation payments previously made to Claimant pursuant to the Act.

2. Employer shall pay Claimant compensation for permanent partial disability for a period of 104 weeks beginning October 6, 1981. Said payments shall then be made by the Special Fund pursuant to Section 44 of the Act until February 18, 1984, and for the period August 1, 1985 and thereafter. These payments shall be made at the compensation rate of $89.20 per week based upon Claimant's loss of wage-earning capacity of $133.80 per week.

3. Employer and the Special Fund shall receive credit for all compensation heretofore paid, as and when paid.

4. Employer shall reimburse Claimant for her reasonable and necessary medical expenses pursuant to Section 7 of the Act in the amount of $793.19 plus interest.

5. Employer shall continue to pay for medical treatment and expenses as the nature of Claimant's condition may require in the future.

6. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982).[13]

7. The District Director will perform all computations necessary to determine specific amounts based on and consistent with the findings and order herein.

8. Claimant's attorney shall have thirty days from the date of service of this decision by the District Director to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty days from date of service to file any objections thereto.

A

STEPHEN L. PURCELL
Administrative Law Judge

[13] Effective February 27, 2001, the applicable interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order on Remand by the District Director. This order incorporates by reference this statute and provides for its specific administrative application by the District Director. *Grant v. Portland Stevedoring Co.*, *et al*., 16 BRBS 267 (1984).

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefit Review Board within 30 (thirty) days from the date of this Decision by filing a Notice of Appeal with the Benefits Review Board at P.O. Box 37601, Washington, D.C. 20013-7601. A copy of this Notice of Appeal must also be served on Allen Feldman, Esq., Associate Solicitor for Black Lung and Longshore Benefits, 200 Constitution Avenue, N.W., Room N-2117, Washington, D.C., 20210.